

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

RECEIVED

SEP 9 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re: )  
)  
Request of Cellular Communications of ) File No. \_\_\_\_\_  
Puerto Rico, Inc. to Hold an Auction )  
To License Cellular RSA No. 727A, )  
Ceiba, Puerto Rico )

DOCKET FILE COPY ORIGINAL

To: The Commission

PETITION FOR DECLARATORY RULING OR,  
IN THE ALTERNATIVE, FOR RULEMAKING

Cellular Communications of Puerto Rico, Inc. ("CCPR"), by its attorneys, hereby requests that the Commission declare that an auction will be used to license cellular rural service area ("RSA") No. 727A, Ceiba, Puerto Rico, which currently is slated for "re-lottery." In the alternative, CCPR requests that the Commission commence a rulemaking proceeding to determine whether the public interest would be better served by holding an auction for this RSA.

INTRODUCTION

On July 12, 1996, the Commission announced by public notice that it will hold a "re-lottery" on September 18, 1996, for six markets in which the original lottery winner was found defective.<sup>1/</sup> The Lottery Notice stated the lottery would be held in accordance with

<sup>1/</sup> Lottery Notice, FCC To Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner was Defective (July 12, 1996) ("Lottery Notice") (lottery to held for A block RSAs: Polk, AR; Monroe, FL; Goodhue, MN; Barnes, ND; Bradford, PA; Ceiba, PR). The pending applications for the initial lotteries for these

(continued...)

No. of Copies rec'd  
List ABCDE

044  
WT

the Commission's decision in PP Docket No. 93-253 concerning "unserved" areas.<sup>2/</sup> That decision provides that the Commission will use random selection instead of competitive bidding to award licenses for all cellular unserved areas in which applications were filed prior to July 26, 1993.<sup>3/</sup> Because these RSAs do not fall within the scope of the Commission's Unserved Areas Order and because the public interest would not be furthered through use of a lottery, CCPR respectfully requests that the Commission hold an auction on the earliest possible date to license the Ceiba RSA.

## **I. Background**

Before enactment of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),<sup>4/</sup> the Commission conducted "re-lotteries" to award licenses for cellular RSAs in cases in which the former Mobile Services Division had dismissed the applications of the

---

<sup>1/</sup>(...continued)

six RSAs were filed in 1988 and 1989. The original lottery winner for the Ceiba RSA was among a group of applicants that participated in a mutual consent risk sharing agreement. Algreg Cellular Engineering, 6 FCC Rcd 2921 (1991). The Commission found that participation in this type of agreement violated several of its rules and the winner's application for the Ceiba RSA was eventually dismissed with prejudice. Algreg Cellular Engineering, 8 FCC Rcd 2226 (1993).

<sup>2/</sup> Lottery Notice at 1.

<sup>3/</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 7387 (1994) ("Unserved Areas Order").

<sup>4/</sup> Pub. L. No. 103-66, 107 Stat. 312 (1993).

previous lottery winners.<sup>5/</sup> The Budget Act changed the Commission's licensing procedures, however, by permitting the agency to use auctions instead of random selection.

In the Second Report and Order, the Commission adopted general auction rules and specified that all mutually exclusive applications for initial licenses in the Public Mobile Services filed after July 26, 1993 would be subject to competitive bidding.<sup>6/</sup> The Commission expressly declined to determine whether applications filed prior to that date would be issued by auction or lottery.<sup>7/</sup> To this date, the Commission has addressed this issue only in connection with applications filed for unserved areas.

## **II. The RSAs Slated for Re-lottery do not Fall Within the Scope of the Unserved Areas Order**

Neither the plain language of the Unserved Areas Order, nor its specific findings can support the Commission's decision to re-lottery these six RSAs. As a threshold matter, the

---

<sup>5/</sup> See, e.g., Marco Communications Corp., 8 FCC Rcd 6289 2143, 2144 (1993); Sunde Cellular Communications, Inc., 8 FCC Rcd 502 (1993); Cells Co., 7 FCC 2143, 2144 (1992); Fair Oaks Cellular Partners, 7 FCC Rcd 2202 (1992); Ten-Ten Gen. Partnership, 7 FCC Rcd 2142 (1992); Pacific Nat'l Cellular, 7 FCC Rcd 2247 (1992); Florida Cellular Mobil Communications Corp., 7 FCC Rcd 2079 (1992); Progressive Cellular III B-3, 7 FCC Rcd 2080 (1992), Butte Cellular Group, 6 FCC Rcd 6745, 6748 (1991); see also Lottery Notice, Mimeo No. 21710 (Feb. 6, 1992); Lottery Notice, Mimeo No. 21449 (Jan. 29, 1992); Lottery Notice, Mimeo No. 2438 (Apr. 3, 1990). The foregoing orders and notices specifically address re-lotteries conducted on or before April 8, 1992.

<sup>6/</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348 (1994) ("Second Report and Order") (implementing Section 6002(e) of the Budget Act, which gave the Commission discretion to award licenses either by auction or lottery for applications filed prior to July 26, 1993).

<sup>7/</sup> See id. at 2539 n.55 ("As noted, we will address the applicability of competitive bidding to certain cellular radio applications filed prior to July 26, 1993, in a separate order. These applications present unique issues because of the special rule that Congress adopted in Section 6002(e) of the Budget Act that is applicable only to mutually exclusive applications filed prior to that date.")

Unserved Areas Order, by its terms, is limited to unserved areas, which are defined as areas that "are generally within the borders of cellular markets".<sup>8/</sup> In contrast, these RSAs constitute entire cellular markets rather than portions of them.

In addition, in the Unserved Areas Order, the Commission noted that the "questionable commercial value" of the cellular unserved areas militates against the use of auctions.<sup>9/</sup> The fact that an area within an RSA or MSA remains unserved generally demonstrates that providing service to such area was not deemed commercially viable by the licensee. Thus, the Commission was concerned that the typical unserved area would be unlikely to attract significant bids at auction.

The same cannot be said of the typical RSA. The RSAs now proposed for lottery have never been available for build-out by a permanent licensee. The ultimate licensee would have an entire market area open for commercial development, rather than a minute portion of another licensee's territory. RSAs were established in a manner designed to foster the development of strong, economically viable cellular systems.<sup>10/</sup>

In many cases, unlicensed RSAs have been considered so valuable that, despite significant financial risk, adjacent cellular licensees have built facilities and offered service pursuant to interim operating authority ("IOA"). An affiliate of CCPR, for instance, operates the Ceiba RSA under an IOA. IOAs are risky because, at the time the FCC awards a permanent license, the interim operator must effect an orderly transfer of the market to the

---

<sup>8/</sup> Unserved Areas Order, 9 FCC Rcd at 7388 n.2.

<sup>9/</sup> Id. at 7392

<sup>10/</sup> Rural Cellular Service, First Report and Order, 60 RR 2d 1029 (1986).

new licensee. If an acceptable agreement for the sale of constructed facilities cannot be reached, the interim operator could lose its entire investment. The fact that interim service was undertaken despite such risks provides proof that the market's license has auctionable value.

The Commission's determination in the Unserved Areas Order that equitable factors weighed against holding an auction are inapplicable here.<sup>11/</sup> The applicants for these RSAs have already lost the lotteries and, only by virtue of the disqualification of the winning entity, are they getting a second chance. Moreover, given the sheer number of applicants (e.g., 491 for Ceiba, PR), no single applicant could have any reasonable expectation of being the lottery winner. Indeed, those parties who are truly serious about constructing and operating systems in these RSAs will fare much better in an auction than through the luck of random selection.

Similarly, auctioning of these licenses is unlikely to result in any delay in service to the public.<sup>12/</sup> In the case of Ceiba, the public already is being served by CCPR under an IOA. Moreover, the Commission has conducted many successful auctions in the PCS, MMDS, SMR, and other services, and the competitive bidding process has proven to be an efficient and effective method of allocating licenses. In any event, it is not at all clear that a lottery winner would be in any position to commence service in the near term. The pending applications were filed eight years ago -- many by parties with no operating experience -- and

---

<sup>11/</sup>See Unserved Areas Order, 9 FCC Rcd. at 7391.

<sup>12/</sup> Id. at 7392.

it is likely that many of the groups formed for the purpose of participating in the lottery no longer exist.

Finally, the public interest favors auctioning these RSA licenses. As noted above, it is unlikely that most of the existing applicants intend to construct their own facilities and provide service to the public. By contrast, there are a plethora of potential bidders who are sincerely interested in the "development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas . . ."<sup>13/</sup> Indeed, the operators of adjacent cellular and PCS systems have a powerful incentive to bid on such RSA licenses to round out their service areas. While adjacent licensees would undoubtedly be willing to purchase authorizations from lucky lottery winners, the public interest would be better served if that money was paid to the United States Treasury.

---

<sup>13/</sup> See 47 U.S.C. § 309(j)(3).

## CONCLUSION

For the foregoing reasons, CCPR respectfully requests that the Commission hold an auction, rather than a re-lottery, for RSA No. 727A, Ceiba, Puerto Rico.

Respectfully submitted,

Cellular Communications of Puerto Rico, Inc.

A handwritten signature in cursive script, appearing to read "Sara Seidman", written over a horizontal line.

Charles D. Ferris

Sara F. Seidman

Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo

701 Pennsylvania Avenue, N.W., Suite 900

Washington, D.C. 20004

202/434-7300

Its Attorneys

September 9, 1996

**CERTIFICATE OF SERVICE**

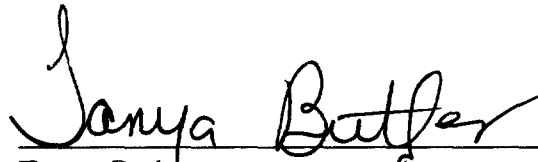
I, Tanya Butler, hereby certify that a copy of the foregoing "Petition for Declaratory Ruling Or, In The Alternative, For Rulemaking" was served by messenger on the following:

Rosalind Allen  
Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5002  
Washington, D.C. 20554

David Furth  
Chief  
Commercial Wireless Division  
Federal Communications Commission  
Room 7002  
2025 M Street, N.W.  
Washington, D.C. 20554

Steve Markendorff  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7102  
Washington, D.C. 20554

ITS  
2100 M Street, N.W.  
Room 140  
Washington, D.C. 20554

  
Tanya Butler